

CASE NO. 83-550

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In The
Supreme Court of the United States

October Term, 1983

L. D. JAMESON,

Petitioner,

vs.

BETHLEHEM STEEL CORPORATION,

Respondent.

**BRIEF IN OPPOSITION TO PETITION FOR A
WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT**

JAMES A. SMITH
SQUIRE, SANDERS
& DEMPSEY
1800 Huntington Building
Cleveland, Ohio 44115
(216) 687-8500

*Attorneys for Respondent
Bethlehem Steel
Corporation*

QUESTION PRESENTED

1. Whether a participant under a pension plan may bring an action against his former employer to recover pension benefits and to enforce rights under the pension plan, without suing the pension plan, under Section 502 (a)(1)(B) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. Section 1132(a)(1)(B).

PARTIES TO PROCEEDING

All of the parties are listed in the caption. Bethlehem Steel Corporation has no parent. Its shares are publicly traded. Virtually all of its subsidiaries are either wholly owned directly by it or indirectly through its subsidiaries. None of the subsidiaries or other affiliates in which Bethlehem Steel Corporation owns an interest has publicly-traded shares.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is unreported. The Order of the Court of Appeals is printed as Appendix A to the Petition for a Writ of Certiorari, at App. 1-3.

The Opinion of the United States District Court for the Northern District of Ohio, Eastern Division is unreported. The Memorandum of Opinion and the Order of the District Court are printed as Appendices B and C to the Petition for a Writ of Certiorari, at App. 4-14.

JURISDICTION

The petitioner has invoked the jurisdiction of this Court pursuant to 28 U.S.C. Section 1254(1). The respondent does not contest the jurisdiction of this Court to consider the Petition for a Writ of Certiorari.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are Sections 502 (a)(1)(B), (d)(1) and (2), and (e)(2) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. Sections 1132(a)(1)(B), (d)(1) and (2), and (e)(2). Section 502(a)(1)(B) of ERISA, 29 U.S.C. Section 1132 (a)(1)(B), reads, as follows:

“(a) A civil action may be brought —
 (1) by a participant or beneficiary —

. . .

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan; . . .”

The remaining statutory provisions are printed as Appendix D to the Petition for a Writ of Certiorari, at App. 15.

STATEMENT OF THE CASE

A. The Proceedings

The petitioner, L. D. Jameson, filed this action in the Northern District of Ohio, Eastern Division. There was no evidence that the petitioner was ever employed in the Northern District of Ohio or that he ever resided in the Northern District. The only evidence was that the petitioner had been employed abroad and resided in Las

Cruces, New Mexico. The only nexus with the Northern District was that petitioner's attorney had an office in the Northern District.

The only defendant named in the action was the respondent, Bethlehem Steel Corporation. It employed the petitioner from 1975 to 1980. It sponsored a pension plan for its employees and the employees of certain of its subsidiary companies, the Pension Plan of Bethlehem Steel Corporation and Subsidiary Companies ("Pension Plan").

The Pension Plan was not named as a defendant in the action. It was uncontested that the Northern District did not have personal jurisdiction of the Pension Plan.

The Complaint alleged that the failure to credit the petitioner with his service with one of respondent's affiliated companies, The Iron Mines Company of Venezuela, for pension purposes, violated ERISA, 29 U.S.C. Section 1001, *et seq.* The primary relief sought by the petitioner was the payment of pension benefits and other retirement benefits allegedly due under the Pension Plan.

The respondent moved to dismiss the action on the grounds that (1) it was not a proper party and (2) the Pension Plan was an indispensable party but was not subject to the jurisdiction of the Northern District.

The District Court granted respondent's Motion to Dismiss on both grounds and dismissed the action without prejudice. The District Court ruled that the respondent as the former employer and the plan sponsor was not a proper party. It also ruled that the Pension Plan was an indispensable party to the action, but was not subject to the jurisdiction of the Northern District. It found that the Pension Plan was "managed and controlled exclusively by the General Pension Board and its Secretary" It also found that the petitioner had "produced no evidence that [respondent] controlled the plan or had anything to do with its administration" It further found that the

Secretary of the General Pension Board, with the approval of the General Pension Board, had "determined that [petitioner] was not entitled to credited service for the length of his employment in Venezuela."

In his appeal to the Court of Appeals, petitioner contended that he was entitled to bring the action solely against respondent. He argued that he could litigate against respondent the determination made by the Secretary, with the approval of the Board, that he was not entitled to credited service for pension purposes for the period of his Venezuelan employment, on the ground that respondent controlled the General Pension Board. He did not contest the District Court's finding that it could not sustain personal jurisdiction over the Pension Plan.

The Court of Appeals rejected petitioner's arguments. It concluded that his Complaint "must fail for failure to name the pension plan as defendant." It ruled that the Pension Plan was a necessary party to any effective relief in petitioner's action. It also ruled that the General Pension Board and its Secretary were fiduciaries under ERISA and that they did not act as agents of respondent in their capacity as fiduciaries, relying on this Court's opinion in *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981).

B. The Facts

1. *Petitioner's Employment*

Petitioner was employed by respondent from June 1, 1975 until February 29, 1980. He was previously employed by one of respondent's affiliated companies, The Iron Mines Company of Venezuela, from May 5, 1953 until February 28, 1970. On the termination of his employment in Venezuela, he was paid "Cesantia" and "Antiquedades", a form of separation pay required by Venezuelan law, in the total sum of \$56,492. He had the option, under respondent's policy, of repaying the "Cesantia" and "Antiquedades" and having his service in Venezuela re-

stored for the purpose of pension benefits. However, he elected to retain the "Cesantia" and "Antiquedades" and to start as a new employee with a second affiliated company, Bethlehem Mines Corporation. He was employed by Bethlehem Mines Corporation from March 1, 1970 until May 31, 1975.

Petitioner qualified for a deferred vested pension under the Pension Plan, based on his service with Bethlehem Mines Corporation and with respondent from March 1, 1970 to February 29, 1980. He has the option of receiving pension benefits at age 65 or reduced pension benefits beginning at age 60.

2. The Pension Plan

The Pension Plan provides for pension benefits for eligible employees. The benefits are based on years of continuous service with respondent and its affiliated companies who have adopted the Pension Plan. The term "continuous service" is defined in Section 5.1 of the Pension Plan to mean continuous service in the employ of respondent or its covered affiliated companies calculated from the employee's last hiring date. Under Section 5.1 of the Pension Plan that was in effect when petitioner terminated his employment, the determination of the last hiring date was based on the practices that were in effect at the time a break in service occurred. In petitioner's case, his break in service occurred on February 28, 1970 with the termination of his employment with The Iron Mines Company of Venezuela. He started his employment with Bethlehem Mines Corporation on March 1, 1970 as a new employee because of his election to retain the "Cesantia" and "Antiquedades".

The Pension Plan provides for its administration by the General Pension Board and by the Secretary of the Board who acts as the Plan Administrator. The Board has the authority and responsibility for the administration of

the Pension Plan. Subject to action by the Board, the Secretary has the powers and duties under the Pension Plan, including the power and duty to grant such benefits as are provided for under the Pension Plan and to decide such questions as may arise in connection with the operation of the Pension Plan, including determinations concerning credited service.

The Secretary and the General Pension Board made the determination that petitioner was not entitled to credited service under the Pension Plan for the length of his employment with The Iron Mines Company of Venezuela.

SUMMARY OF ARGUMENT

There are no grounds for granting the Petition for a Writ of Certiorari. The lower courts ruled correctly that respondent was not a proper party and that the Pension Plan was an indispensable party. Their decisions are fully in accord with the existing case law. There is no conflict in the federal courts of appeal.

Petitioner's attempt to argue that respondent controls the General Pension Board and its Secretary is contrary to the record in this action, contrary to ERISA, and contrary to this Court's decision in *NLRB v. Amax Coal Co.*, *supra*. The Board and its Secretary are fiduciaries and are not subject to respondent's control in their capacity as fiduciaries.

Petitioner's attempt to phrase the issue in terms of ERISA's venue provisions is belied by the record. The issue is not venue, but whether petitioner can pursue his claim for pension benefits solely against his former employer.

The issue of petitioner's right to pursue his claim for pension benefits solely against his former employer is of little consequence. It is plain from ERISA's provisions that participants in a pension plan will normally pursue

their claims for pension benefits against their pension plan and not against their former employer.

ARGUMENT

There are no grounds for granting the Petition for a Writ of Certiorari. There are no issues that warrant this Court's review.

A. The Lower Courts Ruled Correctly

The lower courts ruled correctly that respondent was not a proper party and that the Pension Plan was an indispensable party. The District Court's dismissal of the action, without prejudice, was fully in accord with the case law.

Respondent was not a proper party. It was only petitioner's former employer and the sponsor of the Pension Plan. It was not the administrator of the Pension Plan, and it did not control the administration of the Pension Plan. It did not make the determination that petitioner was not entitled to credited service under the Pension Plan for his Venezuelan employment.

The Pension Plan was a necessary party. The Pension Plan provided the benefits. The General Pension Board and its Secretary determined that petitioner was not entitled to credited service under the Pension Plan for his Venezuelan employment.

It is plain from the case law that respondent, as the former employer and the plan sponsor, was not a proper party. The federal courts have repeatedly ruled that an employer who sponsors a pension plan is not a proper party in an action for pension benefits under ERISA. The courts have reasoned that the employer does not provide the benefits and that no effective relief can be granted against the employer. *Carter v. Montgomery Ward & Co.*, 76 F.R.D. 565 (E.D. Tenn. 1977); *Barrett v. Thoro-*

fare Markets, Inc., 452 F. Supp. 880 (W.D. Pa. 1978); *Boyer v. J. A. Majors Company Employees' Profit Sharing Plan*, 481 F. Supp. 454 (N.D. Ga. 1979); *Higman v. Amsted Industries, Inc.*, . . . F. Supp. . . ., CCH Pension Plan Guide ¶ 23,554 (E.D. Pa. 1981).

It is equally plain from ERISA and the case law that the Pension Plan was an indispensable party. ERISA plainly provides that an employee benefit plan can be sued as a legal entity, 29 U.S.C. Section 1132(d)(1), and that a money judgment for pension benefits is enforceable only against the plan as an entity, 29 U.S.C. Section 1132(d)(2). The federal courts have repeatedly ruled that an employee benefit plan is a necessary party to any effective relief in an action for benefits under ERISA. *Hill v. Iron Workers Local Union No. 25*, 520 F. 2d 40, 42, n. 1 (6th Cir. 1975); *Carter v. Montgomery Ward & Co.*, *supra*; *Barrett v. Thorofare Markets, Inc.*, *supra*; *Boyer v. J. A. Majors Company Employees' Profit Sharing Plan*, *supra*.

Petitioner's argument that respondent controls the General Pension Board and its Secretary is contrary to the District Court's finding, contrary to the provisions of ERISA, and contrary to this Court's decision in *NLRB v. Amax Coal Co.*, *supra*. The District Court found that the Pension Plan was "managed and controlled exclusively by the General Pension Board and its Secretary" It also found that petitioner had "produced no evidence that [respondent] controlled the plan or had anything to do with its administration" Under the provisions of ERISA, the Pension Plan is an independent entity, and the General Pension Board and its Secretary are fiduciaries who are required to act solely in the interest of the Pension Plan's participants and beneficiaries, 29 U.S.C. Section 1104(a)(1). The General Pension Board and its Secretary do not act as employees, officers

or agents of respondent in their capacity as fiduciaries. Under this Court's decision in *NLRB v. Amax Coal Co.*, their status as fiduciaries is "directly antithetical to that of an agent" of respondent, 453 U.S. at 331-332.

Petitioner's additional argument that he can litigate the question of his credited service with respondent because it appoints the members of the General Pension Board and has retained the right to amend the Pension Plan is meaningless. Petitioner's credited service under the Pension Plan was determined by the Secretary, with the approval of the General Pension Board, on the basis of the existing language of Section 5.1 of the Pension Plan and respondent's practices in effect in 1970. Petitioner's claim that the denial of credited service violated ERISA applies only to the language of the existing Plan, as interpreted by the Secretary and the existing General Pension Board.

Petitioner's arguments are without factual and legal support. They were rejected by both the District Court and the Court of Appeals. Petitioner has not cited a single case that supports his arguments that he can litigate a claim for pension benefits solely against respondent as the former employer and plan sponsor.

B. The Petition Is Based On A False Issue

Petitioner's attempt to persuade this Court to grant a Writ of Certiorari is based on a false issue. The issue of venue under ERISA is not involved in this action. The only question presented is whether a participant may bring an action to recover pension benefits and to enforce rights under a pension plan against his former employer and the plan sponsor, without suing the pension plan.

Petitioner has made no attempt to sue the Pension Plan. He did not contest the ruling of the District Court that it could not assert personal jurisdiction over the

Pension Plan. The question of the interpretation of the venue provisions under ERISA is not presented by this case.

Petitioner's citation of the cases of *Varsic v. U.S. Dist. Ct. for Cent. Dist. of Ca.*, 607 F. 2d 245 (9th Cir. 1979) and *Bonin v. American Airlines, Inc.*, 621 F. 2d 635 (5th Cir. 1980) is irrelevant. Neither case involves the question of whether a participant can litigate his right to pension benefits by suing only his former employer and not the pension plan.

The venue provisions of ERISA are simply not in issue in this action. Petitioner's attempt to describe this case as involving issues of "ready access to the Federal court" and of "broad remedies for redressing or preventing violations" of ERISA simply has no basis in the record of this action.

The issue that is presented by this action is of no importance to the interpretation of ERISA. Participants will normally proceed against their pension plans, even though they may also incorrectly sue their former employers. See *Carter v. Montgomery Ward & Co.*, *supra*; *Barrett v. Thorofare Markets, Inc.*, *supra*; *Boyer v. J. A. Majors Company Employees' Profit Sharing Plan*, *supra*.

The District Court's dismissal of this action, without prejudice, was not unfair to petitioner. He has no contacts with the Northern District and there is no factual basis for asserting personal jurisdiction over the Pension Plan in the Northern District. In fact, the record shows that this action was brought in the Northern District only because the petitioner's attorney has an office in the District.

Petitioner's attempt to litigate the question of his right to pension benefits by suing only his former employer could lead to absurd results. Judgments rendered by the District Courts could be virtually meaningless, as the pension plans would not be bound by the judgments.

Pension plans are separate entities, and money judgments for benefits are enforceable only against the plans as entities, by the very terms of ERISA.

CONCLUSION

There are no grounds for granting the Petition for a Writ of Certiorari. There are no issues that warrant this Court's review. This Court should deny the Petition.

Respectfully submitted,

/s/ JAMES A. SMITH

JAMES A. SMITH

SQUIRE, SANDERS

& DEMPSEY

1800 Huntington Building

Cleveland, Ohio 44115

(216) 687-8500

*Attorneys for Respondent
Bethlehem Steel
Corporation*